IN THE

Supreme Court of the United States

OCTOBER TERM 1944

CHARLES FRANKLIN,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,

Petitioners,

vs.

THE CITY OF NEW YORK et al.,

Respondents.

PETITIONERS' REPLY BRIEF

I. THE OPPOSING BRIEF DOES NOT DENY (A) THAT ITS OPPOSITION TO PAYMENT OF PETITIONER'S COMPENSATION IS BASED ON THE THEORY THAT ARTICLE SIX, PARAGRAPH 8-D OF THE UNIFICATION PLAN COVERED ONLY THE LIABILITY OF THE RECEIVERSHIP ESTATE; OR (B) THAT THE DISTRICT COURT SO DECIDED, BASING ITS ALLOWANCE OF $20,000 FOR EIGHT YEARS' WORK ON THE CITY'S REQUESTED INTERPRETATION; OR (C) THAT SUCH CONSTRUCTION WAS ERRONEOUS.

The failure to controvert our position set forth in Point I of our main brief (pp. 14-19), is virtually a confession of error. It shows that, under a correct construction of Article Six, paragraph 8-d, the City must be held to have assumed the liability of Manhattan Railway Company as such, and not merely the liability of the receivership estate.

The purpose of Article Six, paragraph 8-d, as specifically covering petitioner's services in question, was plainly declared in writing and understood by counsel in charge of unification for the City of New York, before the said clause was inserted in the Plan (fols. 5799-5800, 5786-7, 1422-3).

The City's default would appear to render academic alternative relief sought under Article Six, paragraph 6 of the Plan, although it is clear from the affidavit sworn to by Assistant Corporation Counsel Gaud that Article Six, paragraph 6 of the Plan was likewise inserted for the purpose of permitting petitioner to recover his fees out of the existing reserve funds created by Manhattan stockholders to pay the Company's legal compensation and expenses (fols. 479-82).

The City brief does not question Petitioner's Exhibit 124 (which we annex) showing that all payments to petitioner, including share of fees paid to counsel for the Modified Stock Committee, do not equal his office expense incurred in the litigated matters in question (cf. fols. 2794-5). As Judge Hulbert said (fol. 7294), this exhibit was in no way "impugned".

It will be noted that the City brief, without in any way denying the material allegations and arguments of the petition and brief, has misrepresented the issue sought to be reviewed. Petitioner seeks review not of the amount of an allowance for service as such, but of the erroneous theory on which the allowance was made.

II. THE COURT WAS PREVENTED FROM EXERCISING DISCRETION IN RESPECT TO PETITIONER'S SERVICES BY THE CITY'S INSISTENCE THAT ANY ALLOWANCE TO PETITIONER MUST BE RESTRICTED TO SERVICES DIRECTLY BENEFITING THE ESTATE. SUCH DEMAND NECESSARILY EXCLUDED ALL OF PETITIONER'S GENERAL COUNSEL WORK AND VIRTUALLY ALL SOLICITOR SERVICES OVER THE EIGHT-YEAR PERIOD.

At the hearing before Judge Patterson June 24, 1940 Assistant Corporation Counsel Gaud stated the City's position as to petitioner's services (fols. 319, 323):

> "A great deal was clearly rendered on behalf of Manhattan and of its stockholders. He should be compensated by his clients, and not by the receivership estate * he was representing the stock of the Company."

to which petitioner responded, although the Court refused to hear argument (fol. 326):

> "I take the positon that under the * Plan of Unification the City is under distinct obligation to pay me for *all* of my services."

The District Court held (fol. 330):

> "* * * the Plan of Unification makes provision for allowance of *receivership* charges and expenses; no purpose of charging the City with any further amounts has been shown."

At the subsequent hearing, Judge Patterson addressing petitioner said (fol. 347):

> "Have an order * permitting all matters presented under Section 8 to be deemed added to supplement your petition under Section 6."

This had reference to the first draft of the petition under Article Six, paragraph 6, which became the petition of August 29, 1940 appearing at folio 361 *et seq.* Formal leave to file the same was later granted (fol. 484).

The City's contention (pp. 5-8)—that the allowance of $20,000 for eight years' continuous labors (being one-fifth of petitioner's out-of-pocket expense incurred in the performance of the work) leaving nothing whatsoever for the services rendered—is hardly to be taken seriously as "reasonable exercise of judicial discretion".

Manhattan Railway Company was held to be an "essential party" to the receivership (fol. 293). The Company was one of the contracting parties to the Plan. It was induced to release all of its claims against the Interborough estate (Article Five, subd. 3a-b of Plan, p. 38). According to railroad engineers, these claims aggregated $60,000,000 in excess of the Company's funded debt. In addition to Manhattan cars, structures, equipment and power houses, the City took over $6,000,000 cash representing condemnation awards, fire insurance, etc., made to the Company and held in bank custody as a depository, not as trustee. The consideration to Manhattan Company was the City's solemn undertaking to assume the Company's contract obligations to petitioner for his services as general counsel and solicitor. The Plan includes the City's agreement to indemnify Manhattan Railway Company and its officers, directors and security holders from liability on account of the Company's debts and liabilities (Plan, p. 48, last paragraph). *Judge Patterson entered the receivership in February 1938* (fol. 1302) *after the greater part of petitioner's work was concluded.* It is submitted that simple justice and traditional principles of equity require that the City shall carry out its obligation.

As pointed out at page 12 of our petition the reference to exception to contracts with counsel (p. 5) does not apply; nor do the cases cited at pages 7-8 of the City's brief. *Palmer* v. *Watson,* 122 F. (2d) 598, expressly disclaimed any attempt to decide the obligation of the depositors to the Committee (p. 600). The case did not concern a corporate liability of an essential party to the cause; moreover the District Court subsequently did enforce the

contract of committee counsel against the depositing stockholders, thus recognizing that compensation contracts are enforceable under the Unification Plan.

III. The City Brief (p. 8) has erroneously interpreted the Borah Act.

The Borah Act is a statute enacted by Congress, August 25, 1937 (28 U. S. Code, Sec. 572a), and provides: *

The Act does not apply to petitioner, because: (a) Manhattan's agreement was not with "any other party" but with its own attorney; and (b) the fee was not to be paid from the receivership estate.

(a) It is only necessary to read the statute to observe that it was directed at agreements between parties, not between a party and his own attorney. When the bill to enact this statute was before the Senate, its sponsor, Senator Borah, carefully pointed this out, and proposed an amendment, accepted by the Senate, to make this wholly clear. The Senate minutes are quoted *in extenso* in *In re Trans-State Oil Co.*, 24 F. Supp. 454, 457 (S. D. Texas). On the appeal of this case *sub nom. Zweifel, Tuohy & Crager* v. *Trans-State Oil Co.*, 99 F. (2d) 650 (C. C. A. 5th), the Court held that *an agreement between a corporate debtor in reorganization and its attorney was not within the scope of the Act.*

(b) The agreement does not purport to relate to payments from the receivership estate. The District Court adopted this second ground in ruling the Borah Act inapplicable (fol. 7294).

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* "It shall be unlawful for any party in interest, or any attorney for any party in interest in any receivership * * * proceeding, in or under the supervision of any court of the United States, to enter into any agreement, written or oral, express or implied, with any other party in interest * * * in such proceeding for the purpose of fixing the amount of the fees * * * to be paid to any party in interest or any attorney of any party in interest in such proceeding, for services rendered in connection therewith when such fees * * * are to be paid from the assets of the estate in receivership * * *."

IV. In reply to baseless personal attacks that have deprived petitioner of compensation for duly authorized continuous legal services which began over twelve years ago.

Excerpt from Master's Report repeated here from City brief in court below (City brief, pp. 9-10):

The City brief gives a wrong impression. As to each of the items mentioned, the Special Master merely accepted as a valid objection, the unsupported opinion of opposing counsel, and thus succeeded in defeating petitioner's right to compensation. The City's brief, filed with the Special Master, concluded as follows:

> "Franklin did not hesitate for his own gain either to manufacture evidence or to give false testimony under oath, and he is a person utterly unreliable whose testimony is not worthy of belief."

There is nothing in the record to support this gratuitous opinion of counsel. Petitioner had spent the greater part of his life in association with Frederick H. Wood, Judge Robert S. Lovett, Henry W. Clark, C. Harrison Tweed, Joseph Paxton Blair and Maxwell Evarts. The City's counsel deliberately resorted to iniquitous character assassination as the ground of its opposition. The authorities cited at page 10 of the City's brief have no application to petitioner or to any facts in this cause.

The City's personal attack provides an additional human, if not certiorari, reason for granting relief. Petitioner begs leave to briefly summarize the grounds of the City's opposition, mentioned in the Special Master's Report:

"*Ex Parte Manhattan*" (City brief, p. 10):

This objection refers to the fact that an associate (Prof. Harry Shulman of Yale University) assisted petitioner in one phase of the mandamus proceeding, and therefore holding that petitioner should be denied compensation. The facts, established by uncontradicted evidence, are these:

Petitioner himself originated the idea of the mandamus proceeding against Judge Manton (fols. 5827-30). He prepared the elaborate printed petition submitted to Judge

Augustus N. Hand, August 9, 1933 (fols. 3436-3528, cf. fols. 4921-2). Subsequently, Prof. Shulman revised the petition and submitted it to Mr. Justice Stone (fols. 5840, 6359-61). All the work was done under petitioner's supervision (fols. 5831-2). The revised petition printed in the record states (fol. 3574):

> "Prior to the filing of this petition your petitioner's counsel had taken steps toward the filing of the petition in the Circuit Court of Appeals and was advised by one of the Judges of that Court to seek relief in this Court."

Prof. Shulman's letter to petitioner reads in part: *

Petitioner testified that he was assisted in the matter by Prof. Shulman (fol. 727). The May 15th petition also mentions Prof. Shulman's assistance (fol. 37).

Ex parte Manhattan effected the removal of Judge Manton from the case. The Special Master could find no benefit in this. He said (fol. 6659):

> "There has been no satisfactory showing that a continued supervision of such Estates by Judge Manton would have resulted in less advantageous awards to the Manhattan stockholders, or in less efficient management of the Receivership Estates."

This Court had taken the view that Judge Manton "was embarrassing the receivership" (289 U. S. 505). *Ex parte Manhattan* was a unique proceeding. There were few precedents. Any conscientious lawyer, serving the best interests of his client, would certainly have obtained the ablest assistance he could contact.

Johnson case (City brief, p. 10):

The Report states that petitioner contradicted himself under cross-examination on the question of the parties be-

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* "* * * It is of course entirely true that I was in the case only as your associate and assistant and only through your permission * * *. It is also a matter of record, and I think Mr. Gaud knows it, that you prepared the long printed petition for mandamus to the Circuit Court of Appeals, the affidavit of prejudice used in that petition and also in the petition to the Supreme Court, and that you went over the petition and brief that I drafted and that you argued before Mr. Justice Stone in New York on the motion to dissolve his restraining order" (fols. 6177-80).

hind him in the *Johnson* case. The record is entirely clear that Manhattan's board of directors adopted the suit and gave specific instructions in regard to the appeal to this Court. Petitioner reported regularly to the Board and to the stockholders on the progress of the suit (fols. 3740-2, 3746, 3750-3). The City of New York approved of petitioner's work in the *Johnson* case and filed a brief with this Court as *amicus curiae*.

Petitioner's experience (City brief, p. 9):

The Report erroneously states that petitioner's experience in general counsel work began in 1930, and that prior thereto his experience was limited to trying cases. The opposite is the fact. Petitioner was General Attorney of Southern Pacific Railway System at New York up to 1930. Prior thereto a dispute arose as to the terms on which petitioner handled litigated cases over a 7-year period from 1922 to 1929. The matter was heard by Referee John E. Joyce whose report found:

> "Plaintiff has spent 30 years in defendant's service, and performed his work with diligence, zeal and more than usual ability" (S. P. Rec., fol. 3817).

During cross-examination the City, without notice, produced the Southern Pacific printed record in the Court below (58 F. 2d 1081) which had affirmed on jurisdictional grounds. *Referee Joyce expressly found that, prior to 1930, the litigated matters were referred to outside counsel* (S. P. Rec., fol. 3766). In the entire report of Referee Joyce, there is not a word of criticism of petitioner. This unrelated case disposed of long prior to the receivership was nevertheless used as a vehicle of attack.

Adoption of July 2, 1940 resolution (City brief, p. 10):

The Report states that the resolution designated Exhibit E annexed to supplemental petition was not adopted (fols. 413-8). It is not disputed that said resolution was sent to each director of the Company, and that each approved the same (fols. 2725-32, 6212-20, 6181-204). The resolution not having been planned was oral and its precise form was left to counsel (fols. 3241, 3158-9). It was not until the replies were received that the supplemental petition of

August 29, 1940 was filed.* The opinion below declared as to this objection (p. 2447):

> "whether the Manhattan board of directors at a meeting on July 2, 1940 authorized the filing of the supplemental petition is a matter hotly disputed, but *we do not regard the issue as material.*"

The fact is, that whereas there was no provision of the Unification Plan, or of any statute, decision or rule, requiring such authorization, yet the evidence cited in the footnote showed conclusively that authorization was given.

Earnings prior to receivership (City brief, p. 9):

The Report says that petitioner's cross-examination as to his earnings from private clients, prior to the commencement of his work in the receivership, was confused and evasive. Petitioner was required to give a list of his private clients, fees paid for some 10 years past, and answered from memory. Petitioner's testimony was not controverted and was most explicit considering the lapse of time, and the fact that he had no advance notice of any such inquiry.

Compensation resolutions and contracts (City brief, p. 10):

The Report suggests inconsistency in petitioner's cross-examination as to the existing contracts with Manhattan. The criticism is unfounded. There is no dispute as to the February 8, 1934 resolution (readopted each year including 1939) retaining petitioner as general counsel and solicitor, or as to the resolutions of April 26, 1940, June 1, and June 17, 1938 or as to the contract of June 17, 1938.

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* Petitioner testified that the resolution was adopted unanimously (fols. 2891-4). In this he was corroborated by the oral testimony of a majority of the directors, including Mr. Joyce who offered the resolution (fols. 3240-2, 3261-3), Mr. Bache who seconded the resolution (fols. 3156-8, 3160-1, 3175), Jeffers (fols. 2496-7), Russell (fols. 2425, 2429-30, 2446), Currier (fols. 3143-6, 3148-51), Pierce (fols. 2451-2), and other witnesses including Clifford Michel (fols. 3190-5) and Hernly (fols. 2523-8). Mr. Watson as the Company's president swore to this petition, to which the disputed resolution was annexed, and did not question its adoption (fols. 2377-2412).

Alleged exaggeration (City brief, p. 10):

The Report says there was exaggeration. Petitioner initiated many proceedings as events in the receivership required special action to protect the stockholders. He participated actively in several hundred matters where the Company's and stockholders' interests were directly involved, and was required to take a position. The extent of the services to the Company and its stockholders was very great.* As to the importance of the services the testimony, company resolutions and letters of the directors admitted in evidence sustain petitioner's view that the services were of large value.

As noted, these alleged objections were accepted *in toto*, and made the Special Master's rule of decision. These baseless and irrelevant attacks are answered categorically in List of Errors, filed by leave of the District Court, printed at folios 7246-68, 6864 et seq.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated, New York, February 7, 1945.

Respectfully submitted,

CHARLES FRANKLIN,
Counsel for Manhattan Railway Company and pro se,
Petitioners.

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* There were admitted in evidence all petitions and orders in the printed receivership record, all of petitioner's arguments made before the District Court during the eight-year period, and petitioner's briefs and records before this Court, the Circuit Court of Appeals, the District Court, and State Appellate Courts.

Petitioner's Exhibit 124

Statement showing Mr. Franklin's income a
expenses 1932-1940.

STATEMENT OF INCOME AND EXPENSES OFFICE OF CHARLES FRANKLIN FOR CALEN

(Note: Exclusive of disbursements for printing out of mo

	1932	*1933*	*1934*	*1935*	*1936*
Total Income* **	$43,500.00	$11,200.00—	$ 9,700.00—	$ 4,100.00—	$ 3,800.(
Office Salaries and Expenses, including Overtime	$11,424.00	$ 8,714.00—	$ 7,690.00—	$ 6,900.00—	$ 6,945.(
Printing, Binding and Stationery, and Office Equipment	4,836.28	5,871.52—	4,064.16—	3,080.00—	3,446.2
Postage and Express Charges	247.50	266.00—	259.60—	255.00—	154.2
Telephone and Telegraph	243.37	271.48—	221.44—	166.60—	149.(
Filing Fees, Railroad Fares, Maps, etc.	360.00	447.00—	247.85—	554.75—	295.(
Miscellaneous Repairs and Supplies	119.00	135.00—	107.40—	116.00—	113.2
Office Rental and Electric Light	2,110.00	2,122.00—	2,114.00—	2,096.00—	2,094.(
Water Cooler Rental	60.00	60.00—	60.00—	60.00—	60.(
Law Books, Law Journals, Dues, Subscriptions, etc.	560.00	570.00—	166.48—	190.00—	128.8
TOTALS	$19,960.15	$18,457.00—	$14,930.91—	$13,418.35—	$13,386.(
	43,500.00	11,200.00—	9,700.00—	4,100.00—	3,800.(
INCOME SHOWING PROFIT OR LOSS	$23,539.85 *Profit*	$ 7,257.00— *Loss*	$ 5,230.91— *Loss*	$ 9,318.35— *Loss*	$ 9,586.(*Loss*

* Amount received includes payment of $3,000 per annum for attending to Company's transfers of stock by fiduciaries, etc.

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[Cf. Judge Hulbert's opinion (fol. 7295). The $20,000 allowed by Judge I representing Mr. Franklin's interest in the allowance to the solicitors for the Mod mately cover the office deficit. But $7,500 of the $35,000 was withheld on a cl settled at a cost to Mr. Franklin of about $4,000. Hence the actual realization the Circuit Court of Appeals has been largely consumed in this litigation.]

ibit 124.

ncome and office overhead
1940.

OR CALENDAR YEARS 1932 TO AND INCLUDING FIRST HALF OF 1940.

out of moneys advanced by directors.)

1936	*1937*	*1938*	*1939*	*6 mos. 1940*	*Totals*
$ 3,800.00—	$ 4,500.00—	$ 4,000.00—	$ 3,900.00—	$ 2,900.00—	$44,100.00
$ 6,945.60—	$ 7,100.00—	$ 6,500.00—	$ 4,925.00—	$ 2,562.50—	$51,337.10
3,446.21—	2,703.28—	3,135.93—	2,757.94—	922.48—	25,981.50
154.20—	118.40—	127.50—	216.70—	113.60—	1,511.00
149.03—	184.40—	142.60—	146.90—	78.35—	1,360.80
295.00—	434.85—	195.40—	126.50—	———	2,501.35
113.55—	115.00—	21.00—	20.70—	17.50—	646.15
2,094.00—	2,086.00—	1,280.00—	1,272.00—	647.30—	13,711.30
60.00—	60.00—	———	———	———	300.00
128.88—	112.00—	98.40—	90.50—	54.00—	1,410.26
$13,386.47—	$12,913.93—	$11,500.83—	$ 9,556.24—	$ 4,395.73—	$98,559.46
3,800.00—	4,500.00—	4,000.00—	3,900.00—	2,900.00—	44,100.00
$ 9,586.47— *Loss*	$ 8,413.93— *Loss*	$ 7,500.83— *Loss*	$ 5,656.24— *Loss*	$ 1,495.73— *Loss*	$54,459.46 *Loss*

** Appointed solicitor for Manhattan Railway Company December 31, 1932 and elected General Counsel November 11, 1932. The profit of $23,539.85 not included in calculating net loss during period.

Judge Patterson under the decree of July 3, 1940, and $35,000 the Modified Stock Committee (fols. 2263, 3025), would approxi- on a claim of an assistant lawyer (fols. 4812-3), subsequently lization was less than the office deficit. The $15,000 allowed by n.]